

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
*See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.*

**FILED BY CLERK**

**SEP -7 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

RICHARD C. BRUMGARD and )  
KAY E. BRUMGARD, individually )  
and as husband and wife, )  
 )  
Plaintiffs/Appellants, )  
 )  
v. )  
 )  
STANLEY D. RIOS and BABETTE M. )  
RIOS, individually and as husband and )  
wife, )  
 )  
Defendants/Appellees. )  
\_\_\_\_\_ )

2 CA-CV 2010-0007  
DEPARTMENT B

MEMORANDUM DECISION  
Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV200900776

Honorable Robert Carter Olson, Judge

**AFFIRMED**

Richard C. Brumgard

Casa Grande  
In Propria Persona

Barassi, Curl & Abraham, P.L.C.  
By David L. Curl

Tucson  
Attorneys for Defendants/Appellees

V Á S Q U E Z, Presiding Judge.

¶1 In this contract action, plaintiffs/appellants Richard and Kay Brumgard (the Brumgards) appeal from the trial court's summary judgment in favor of defendant/appellee Stanley Rios. Because we find that all of the Brumgards' arguments are waived, forfeited, or moot, we affirm.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 17, 180 P.3d 977, 981 (App. 2008). In July 2004, Richard Brumgard, a licensed contractor, entered into a written contract to build a home for Rios. In September 2004, after Rios had changed the site of the home, the parties signed a second contract increasing the amount to be paid, identifying Richard's son, Todd Brumgard, as the contractor, and, in all other respects, incorporating the terms and conditions of the original contract.<sup>1</sup> When construction of the home was partially completed, disagreements arose between Richard and Rios concerning timeliness of completion and workmanship. Consequently, Rios stopped making payments on the contract, and Richard stopped work on the project.

¶3 Rios filed a complaint against Richard with the Registrar of Contractors (the ROC proceeding). After a hearing, an administrative law judge (ALJ) found no grounds existed to impose discipline against Richard's contractor's license. Rios initiated a separate arbitration proceeding against Todd pursuant to an arbitration clause in the contract. After a hearing in August 2006, the arbitrator found in favor of Rios and awarded him damages. In September, Rios filed a civil action in the Pinal County

---

<sup>1</sup>We thus consider the two agreements as a single, integrated contract for purposes of this decision.

Superior Court to confirm the arbitrator's award against Todd. Rios subsequently amended the complaint, naming Richard and Kay as defendants.

¶4 Also in September, Richard recorded a lien with the Pinal County Recorder against Rios's property in the amount of \$47,650. In December, Rios filed an amended complaint in *Rios v. Brumgard*, No. 2 CA-CV 2008-0124 (memorandum decision filed Mar. 27, 2009), by adding a false lien claim. After Todd and the Brumgards failed to respond, the trial court entered a default. The Brumgards moved to set aside the entry of default, arguing they were not parties, they had not been properly served, and had they been served they "would have filed a [c]ounterclaim against [Rios] for his material breach of the underlying construction contract that is at the core of this litigation." They subsequently also argued Rios's claim had been discharged in their pending bankruptcy proceeding. Finding the bankruptcy court had entered an order that "specifically allowed [Rios] to pursue" the false lien claim, the trial court entered final judgment in favor of Rios with respect to this claim in July 2008.<sup>2</sup> We affirmed the court's judgment on appeal. *Rios*, No. 2 CA-CV 2008-0124.

¶5 The Brumgards filed the present action in March 2009, alleging breach of contract and seeking \$47,850 in damages. They moved for summary judgment on the grounds that they were "not a party to the arbitration award and [we]re not bound by the arbitrator's findings" and that Rios was bound by the ROC proceeding and therefore could not "re-litigate[] that issue." In a cross-motion for summary judgment, Rios argued the Brumgards had forfeited their claim for damages under the contract because it was a

---

<sup>2</sup>The judgment did not address Rios's original claim for confirmation of the arbitration award.

compulsory counterclaim that should have been raised in *Rios v. Brumgard*.<sup>3</sup> The trial court granted Rios’s motion, finding the Brumgards’ claim amounted to “a compulsory counter-claim which [should have been] . . . brought before the [c]ourt earlier.” This appeal followed.

## **Discussion**

### **Motion to Strike**

¶6 Preliminarily, we address Rios’s request that we strike the Brumgards’ opening brief and summarily dismiss the appeal because the opening brief “does not conform to any minimal requirements of the Arizona Rules of Appellate Procedure.” We agree the Brumgards’ briefs largely consist of recitations of alleged facts supported by lengthy quotations, some from the record and some from apparently extraneous documents, with little cogent analysis. Moreover, they lack a clear structure; although the opening brief lists five issues presented for review, the argument section purports to address three issues, only one of which—the compulsory counterclaim issue—clearly corresponds to one of the previous five. Nor does the reply brief clarify the issues being raised or address Rios’s contentions that the opening brief is inadequate and the issues raised by the Brumgards are waived or moot.

¶7 However, even though deficient in several respects, the opening brief does include issues at least minimally supported by argument and relevant citations. We

---

<sup>3</sup>Rios also argued the Brumgards’ claim was precluded by the award of damages to Rios in the arbitration proceeding. The trial court apparently found each of these two grounds independently “sufficient to grant the counter-motion.” However, because the Brumgards do not address on appeal the preclusive effect of the arbitration proceeding, we do not consider it.

therefore decline Rios's request that we strike it. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) ("courts prefer to decide each case upon . . . merits rather than to dismiss summarily on procedural grounds"). But we do not consider the issue entitled "Offset," the Brumgards' assertions that summary judgment violated their due process rights and was not supported by the evidence, or their claim that the trial court's award of attorney fees was "punitive." The Brumgards present each of these issues in single sentences, and they utterly fail to develop any argument or cite any authority in their support. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening brief shall include argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . [and] statutes . . . relied on"); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (declining to consider issue raised on appeal "wholly without supporting argument or citation of authority").

### **Compulsory Counterclaim**

¶8 The Brumgards' principal argument on appeal is that they could not have asserted any claim for damages in *Rios v. Brumgard* pursuant to the construction contract with Rios because the "contract was an asset of Brumgard[s'] bankruptcy estate, [and] not mature for suit until the bankruptcy closed in January 2009," after *Rios v. Brumgard* had been decided. They therefore contend the trial court erred in granting summary judgment in favor of Rios based on its finding that their present claim should have been raised as a compulsory counterclaim in *Rios v. Brumgard*.

¶9 “Whether summary judgment is appropriate is a question of law we review de novo.” *Ballesteros v. Am. Standard Ins. Co. of Wisc.*, 223 Ariz. 269, ¶ 6, 222 P.3d 292, 295 (App. 2009). We will affirm a grant of summary judgment when ““there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.”” *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990), quoting Ariz. R. Civ. P. 56(c). “In reviewing a grant of summary judgment, we view the evidence and reasonable inferences ‘in the light most favorable to the party opposing the motion.’” *Cannon v. Hirsch Law Office, P.C.*, 222 Ariz. 171, ¶ 7, 213 P.3d 320, 323 (App. 2009), quoting *Wells Fargo Bank v. Ariz. Laborers Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 13, 38 P.3d 12, 20 (2002).

¶10 In his cross-motion for summary judgment, Rios contended the Brumgards were precluded from making a claim for money damages under the contract because any such claim was a compulsory counterclaim they were required to have asserted in *Rios v. Brumgard*. See *Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992) (compulsory counterclaims subject to principles of res judicata and precluded if not timely asserted). And the trial court specifically requested additional briefing on the effects of the Brumgards’ bankruptcy on the parties’ claims. However, the Brumgards did not make the argument they are now asserting on appeal in their reply to Rios’s cross-motion, their two responses to the court’s request for additional briefing, or at any other time in the proceedings below.<sup>4</sup> Because they therefore did not present to the court their

---

<sup>4</sup>Although the Brumgards do not assert they raised the issue during oral argument on the motions for summary judgment, we note they have failed to provide a transcript of the argument as part of the record on appeal. We therefore “presume that whatever

theory that any counterclaim based on the contract was barred by the bankruptcy proceeding and thus could not have been compulsory, we do not consider it. *See Premier Fin. Servs. v. Citibank of Ariz.*, 185 Ariz. 80, 86-87, 912 P.2d 1309, 1315-16 (App. 1995) (appellate courts do not consider issues and theories not presented to the court below).

¶11 The Brumgards also contend that their current claim was not a compulsory counterclaim in *Rios v. Brumgard* because “[t]he false lien claim [wa]s an independent statutory claim” and was “not a claim arising out of the contractual relationship.” However, because they fail to support this argument with any relevant authority, it is waived. *See Ariz. R. Civ. App. P. 13(a)(6)* (opening brief shall include argument containing “the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities . . . [and] statutes . . . relied on”); *Brown*, 194 Ariz. 85, ¶ 50, 977 P.2d at 815 (declining to consider issue raised on appeal “wholly without supporting argument or citation of authority”).

¶12 In any event, counterclaims are compulsory when “there is a logical relationship between the two claims.” *Technical Air Prods., Inc. v. Sheridan-Gray, Inc.*, 103 Ariz. 450, 452, 445 P.2d 426, 428 (1968). And here, Richard’s lien claim and Rios’s false lien claim were clearly related. Moreover, the lien was expressly based on a “contract” for “labor, services, material, machinery, fixtures, and/or tools” with respect to Rios’s property.<sup>5</sup> As the Brumgards argued in *Rios v. Brumgard*, the contract was

---

transpired at the hearing supported the trial court’s ruling.” *See Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 54, 232 P.3d 1263, 1279-80 (2010).

<sup>5</sup>We find it significant that the Brumgards’ \$47,650 lien is almost exactly the same as their \$47,850 claim for damages in the present case.

therefore “at the core of th[e] litigation.” We are therefore not persuaded there was no “logical relationship” between Rios’s false lien claim and the Brumgards’ claim pursuant to the contract. *See Technical Air Prods.*, 103 Ariz. at 452, 445 P.2d at 428. The trial court did not err in granting summary judgment in favor of Rios. *See Orme Sch.*, 166 Ariz. at 305, 802 P.2d at 1004.

### **Issue Preclusion**

¶13 The Brumgards also argue the ALJ’s ruling in the ROC proceeding precluded Rios from asserting, much less prevailing, in the present action on his counterclaim related to the construction contract.<sup>6</sup> As noted above, the ALJ found no basis for imposing discipline against Richard’s contractor’s license based on his performance on the contract. But, as Rios acknowledges, his counterclaim in the present action was asserted only to offset any damages awarded to the Brumgards. Accordingly, in granting summary judgment in favor of Rios, the trial court found the counterclaim “moot” and did not consider it. Because we have affirmed the court’s grant of summary judgment, we similarly find the question of Rios’s counterclaim to be moot.<sup>7</sup> *See Vinson*

---

<sup>6</sup>Although the Brumgards characterize this issue as *res judicata*, it is clear from the context that they are actually asserting the defense of issue preclusion or collateral estoppel. Were it otherwise, they would be barred from bringing the present action. *See Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986) (following judgment on the merits, *res judicata* or claim preclusion bars second suit based on same cause of action and involving same parties).

<sup>7</sup>In any event, “the sole issue in a proceeding before the ROC is whether a license should be suspended or revoked, and, if so, what conditions must be fulfilled before it is reinstated.” *Bentivegna v. Powers Steel & Wire Prods., Inc.*, 206 Ariz. 581, ¶ 15, 81 P.3d 1040, 1044 (App. 2003); *see* A.R.S. §§ 32-1154, 32-1155. Although it can order restitution, the ROC cannot issue an enforceable order or judgment for money damages against a contractor. *See Sunpower of Ariz. v. Ariz. State Registrar of Contractors*, 166

*v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988) (issue moot where action by reviewing court would have no effect on parties).

### Disposition

¶14 For the reasons stated above, we affirm the trial court’s summary judgment. Rios requests attorney fees on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we grant his request and award his reasonable attorney fees and costs upon compliance with Rule 21, Ariz. R. Civ. App. P. See *Nat’l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 39, 119 P.3d 477, 485 (App. 2005).

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

---

Ariz. 437, 441, 803 P.2d 430, 434 (App. 1990) (ROC may order restitution as condition of license reinstatement); *J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 406, 690 P.2d 119, 125 (App. 1984) (ROC may not award monetary damages). Because the issue of damages consequently was not litigated in the ROC proceeding and was immaterial to the ALJ’s decision, the ROC proceeding had no preclusive effect with respect to Rios’s counterclaim. See *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, ¶ 9, 62 P.3d 966, 968 (App. 2003) (issue preclusion applies only when “issue was actually litigated in the previous proceeding” and “resolution of the issue was essential to the decision”).